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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 630

CONTINENTAL CASUALTY COMPANY, INC.,
et al, Petitioners

v.

ALLSOP LUMBER COMPANY, INC.,
et al, Respondents

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SMITH BROS. CO. INC., LAW PRINTERS, 414-426 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX

	PAGE
Citation to Opinions Below	1
Statutes and Constitutional Provisions Involved	1-3
Question Presented for Review	3
Statement of the Case	3-4
Argument	5-11
Conclusion	12

TABLE OF CITATIONS

CASES

American Surety Company v. Schultz, 237 U. S. 159, 35 S. Ct. 525, 59 L. Ed. 892, 1915	7
Continental Casualty Company v. Allsop Lumber Co., 336 F. 2d 445	9
Continental Casualty Company v. United States for the Use and Benefit of Robertson Lumber Co., 305 F. 2d 794	10
Howard v. United States to Use of Stewart, 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed. 754	5
International Association of Machinists v. Central Airlines, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67 (1963)	8

TREATISE

Moore's Federal Practice, Second Edition, Volume 1	11

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Article III, Section 2	1
Capehart Act of August 11, 1955, 69 Stat. 651 as amended, 42 U.S.C. 1594	1, 3, 5, 10
Section 1352 of the Judicial Code, 28 U.S.C. 1352	1, 4, 5, 11

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the 8th Circuit has been officially reported in *Continental Casualty Co. v. Allsop Lumber Co.*, 336 F. 2d 445.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1352 of Title (28 U.S.C. 1352) and Section 2 of Article III of the Constitution of the United States of America, all as set forth in petitioners' petition.

A portion of the Act commonly known as the Capehart Act and being section 403(a) of Title IV c 783 of the Act of August 11, 1955, 69 Stat. 651 as amended (42 U.S.C. 1594 et seq.) which provides as follows:

"(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction

of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41."

QUESTION PRESENTED FOR REVIEW

Is an action on a payment bond required by the Capehart Act for the balance due on materials supplied to a contractor constructing houses for military personnel under that Act, a case arising under the laws of the United States?

STATEMENT OF THE CASE

The action which is the subject of the pending petition was brought by a lumber dealer against D & L Construction Company and Associates, a joint venture, to recover a balance due the plaintiff for lumber sold and delivered to the joint venture for the construction of housing for military personnel at Fort Leonard Wood, Missouri (R. 51; Petitioners' Appendix A 2).

The joint venture had entered into a contract with the Department of the Army for the construction of approximately 700 houses at Fort Leonard Wood, Missouri pursuant to the provisions of the Act commonly known as the Capehart Act, 42 U.S.C. 1594 et seq. In compliance with the statutory requirements of that Act, the joint venture, as principal, and Continental Casualty Company, as surety, the petitioners here, executed two separate Federal Housing Administration dual obligee payment bonds in the respective amounts of $6,000,000.00 and $5,000,000.00 before commencing any work on the project (R. 51, 52).

Thereafter the joint venture entered into a written contract with the plaintiff whereby it agreed to purchase from plaintiff the lumber which it required for the construction work (R. 52: Petitioners' Appendix A 3). After deliveries were completed there remained an unpaid balance for which plaintiff sued the joint venture and its surety on the payment bond in the United States District Court for the Western District of Missouri, Southern Division.

In its first amended complaint, the plaintiff alleged the Court had jurisdiction by virtue of section 270(a) and 270(b) of Title 40 of the United States Code, commonly known as the Miller Act, and section 1352 of the Judicial Code of the United States (R. 52; Petitioners' Appendix A 4). The District Court concluded that it had jurisdiction of the subject matter under the latter provision of the Code (R. 54; Petitioners' Appendix A 4). On appeal, the United States Court of Appeals for the 8th Circuit affirmed the lower court's holding as to jurisdiction by virtue of the Code provision, and indicated also that the lower court had jurisdiction under section 270(b) of Title 40 U.S.C. as plaintiff had alleged. (Petitioners' Appendix A 4, 7, 12; 336 F. 2d 445 at p.p. 449, 450, 452).

The within petition questions only the lower court's holding, as affirmed by the Appellate Court, that it had jurisdiction of the subject matter under section 1352 of the Judicial Code.

ARGUMENT

The District Court Had Jurisdiction of the Action on a Capehart Act Bond Under Section 1352 of the Judicial Code of the United States.

The petition raised two questions which may be more simply stated as follows:

1. Does a United States District Court, by virtue of section 1352 of the United States Judicial Code, have jurisdiction of actions on Capehart Act bonds; and

2. Did Congress act within the powers granted it by the Constitution in adopting this provision of the Judicial Code?

The decisions of this Court indicate that the answer to both questions must be in the affirmative.

Congress is empowered by the Constitution to confer jurisdiction on such inferior courts as it may from time to time establish of cases, inter alia, arising under the laws of the United States. Article III, Sections 1 and 2 of the Constitution. Whether Congress can give the United States District Courts jurisdiction of an action on a bond "executed under any law of the United States", as it has done in section 1352 of the United States Judicial Code (28 U.S.C. 1352), depends therefore on whether such a case is one arising under the laws of the United States. That an action on such a bond is just such a case is eminently clear from numerous decisions of this Court.

In *Howard v. United States to Use of Stewart,* 184 U. S. 676, 22 S. Ct. 543, 46 L. Ed. 754, where an action was brought in a United States Circuit Court of Appeals

by an individual on a bond of a clerk of a United States Circuit Court, this Court, in holding that such an action was one within the jurisdiction of the Federal Court, stated (22 S. Ct. Reporter 543 at p. 546):

> "But does it not appear from the petition itself that the case was one of which the circuit court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the circuit court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the circuit court (concurrently with the courts of the state) was entitled to take original cognizance, even if the parties had been citizens of the same state. 25 Stat. at L. 434, chap. 866. This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States. *Feibelman v. Packard*, 109 U. S. 421, 423, 27 L. ed. 984, 985, 3 Sup. Ct. Rep. 289; *Backrack v. Norton*, 132 U. S. 337, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; *Reagan v. Aiken*, 138 U. S. 109, 34 L. ed. 892, 11 Sup. Ct. Rep. 283; *Bock v. Perkins*, 139 U. S. 628, 630, 35 L. ed. 314, 315, 11 Sup. Ct. Rep 677 The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon the bond of a clerk of a court of the United States was not of that class.

"It results that, although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds."

In the later case of *American Surety Company v. Schultz,* 237 U. S. 159, 35 S. Ct. 525, 59 L. Ed. 892, 1915, where an action was brought in a United States District Court against a surety on a supersedeas bond furnished by a defendant pursuant to Federal law, and where the defendant surety company contested the jurisdiction of the United States District Court on grounds similar to those now posed by petitioner, this Court, in sustaining the lower court's jurisdiction, stated (35 S. Ct. 525 at p. 525):

"This conclusion ('the suit therein did not involve any controversy respecting the validity, construction or effect of such law' [i.e., laws of the United States]) would be correct if the suit is to be treated as an ordinary action on a sealed instrument voluntarily given. Lovell v. Newman, 227 U.S. 425, 57 L. ed. 582, 33 Sup. Ct. Rep. 375. But while in a sense the supersedeas bond was the contract of the Surety Company, it was not made in pursuance of any agreement with Schultz, and could have been given over his objection, since the laws of the United States (Rev. Stat. §§ 1000, 1007, Comp. Stat. 1913, §§ 1660, 1666) declared that a writ of error could be obtained by the defendant filing an approved bond with surety, conditioned to make good his appeal. Such a bond operated to stay the judgment. Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right

of action on the bond, and in the suit to enforce that right the measure of his recovery depended upon the construction to be given the Federal statute. Such a suit to enforce such a right could be brought in the United States court by virtue of § 24 of the Judicial Code [36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, § 991], which declares that the district Court has jurisdiction of any suit of a civil nature at common law which 'arises under the Constitution or laws of the United States.'

"While there has been no ruling by this court as to whether a suit on a supersedeas bond can be said to 'arise out of the laws of the United States,' yet there would seem to be no doubt on the subject when the source and nature of the plaintiff's cause of action are considered. If there was room for discussion, the matter is concluded by Bock v. Perkins, 139 U. S. 628, 35 L. ed. 314, 11 Sup. Ct. Rep. 677, and Sonnentheil v. Christian Moerlein Brewing Co. 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233, where it was held that a suit on a United States marshal's bond was one arising under the laws of the United States, which, therefore, could be brought in the Federal court without regard to the citizenship of the parties." (Parenthesis supplied)

The conclusion of this Court in the above case that the action on the supersedeas bond was one arising under the laws of the United States, was cited and paraphrased with approval by this Court in the very recent case of *International Association of Machinists v. Central Airlines*, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67, (1963) at 83 S. Ct. 962. In that decision this Court also cited with approval the holding in *Howard v. United States to*

the Use of Stewart, supra, in footnote 17 in 83 S. Ct. Reporter 956 at page 962.

The Petitioner apparently attempts to remove the instant case from the line of decisions referred to above by implying that the bonds furnished in the instant case by the contractor as principal, and Continental Casualty Company as surety, were not required by any law of the United States, but were merely permitted to be filed under the Capehart Act. This is contrary to the express provisions of the Act set forth above, which provides, inter alia:

> "Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40 (the Miller Act) and no additional bonds shall be required under such section." (Parenthesis supplied)

The comments of the court below on the nature of this requirement are pertinent. The Court observed (Continental Casualty Co. v. Allsop Lumber Co., 336 F. 2d 445 at p. 449):

> "After all, the Capehart Act is concerned with a government need, that is, 'the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of poviding suitable living accommodations for millitary personnel'. 42 U.S.C. § 1594(a). It further provides that each housing unit, when available for occupancy, shall be placed under the control of the

Secretary and shall be 'deemed to be housing facilities under the jurisdiction of the military department to which they are assigned'; that, with a stated exception, the stock of the mortgagor shall be transferred to the Secretary when the housing is completed; and that the contract shall contain 'such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States'. All this demonstrates the reality and the integrity of the government's interest. See United States Fid. & Guar. Co. v. United States ex rel. Kenyon, 204 U. S. 349, 27 S. Ct. 381, 51 L. Ed. 516 (1907). Contrast the situation in Mudd v. Teague, 220 F 2d 162 (8 Cir. 1955). Furthermore, the furnishing of the bond is, under the statute, mandatory and is not permissive. These factors, it seems to us, qualify these payment bonds as ones 'executed under any law of the United States', within the meaning of 28 U.S.C. § 1352, and the present suit as an action on such bonds."

That a United States District Court had jurisdiction of an action on such a bond under section 1352 of the United States Judicial Code (28 U.S.C. 1352) and that such a bond was one required by a law of the United States was earlier held by that same court in *Continental Casualty Company v. United States for the Use and Benefit of Robertson Lumber Co.*, 305 F. 2d 794. A Petition for Certiorari in that case was denied by this Court at 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d, 231.

The decisions of this Court quoted above and those referred to in the cited cases have treated the issues raised by petitioner as a single question of law by affirming both the Congressional grant of jurisdiction to the

district courts of actions on bonds required by the Federal laws and the assumption by those courts of jurisdiction of such actions under those Acts. Nevertheless, a jurisdictional gap existed prior to the adoption of section 1352 of the United States Judicial Code which has now been cured by that Act. This is well explained in Professor Moore's treatise on Federal Practice, Second Edition, Volume 1 at page 626, where in commenting on this provision, the author states:

> "This section was added by the Code of 1948 as a new jurisdictional grant. Its background is this. *Feibleman v. Packard,* ((1883) 109 US 421, 3 S Ct 289, 27 L ed 984.) ruled that a suit on a marshal's bond is a suit arising under the laws of the United States. In the absence of a specific grant of jurisdiction this theory required whatever jurisdictional amount was requisite for general federal question jurisdiction. Subsequently, Congress conferred jurisdiction upon the federal courts, irrespective of the amount involved, of actions against a surety company on official and penal bonds given by it. (Act of Aug. 13, 1894, c 282, § 5, 28 Stat. 280, 6 USC § 10.) Section 1352 expands this latter principle so that there is federal jurisdiction on any bond required by federal law and against any type of defendant obligor." (Parenthesis Supplied)

CONCLUSION

It is respectfully submitted that the questions raised by the petition have already been decided by this Court adversely to the contentions of the petitioners. It is also respectfully submitted that the petitioners have not shown special and important reasons for the granting of a writ of certiorari within the meaning of those terms as used in Rule 19 of this Court. The petition therefore should be dismissed.

Respectfully submitted,

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